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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

EARL LLOYD JACKSON, Petitioner, vs. STATE OF CALIFORNIA, Respondent.	NO. 80-6155

PETITIONER'S REPLY BRIEF

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EARL LLOYD JACKSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of California

PETITIONER'S REPLY BRIEF

Petitioner EARL LLOYD JACKSON here replies to respondent's brief in opposition to the petition for writ of certiorari.

ARGUMENT

THE 1977 CALIFORNIA DEATH PENALTY LAW IS UNCONSTITUTIONAL

INTRODUCTION

Respondent begins his defense of California's 1977 death penalty law by averring that the California Supreme Court has thrice upheld its constitutionality. (BIO:17) This statement fails to depict accurately the depth of the division on that court on the question of the statute's constitutionality.

In People v. Frierson, 25 Cal.3d 142, 599 P.2d 587 (1979) only three justices of the court indicated (in dictum, because the defendant's conviction was reversed on other grounds) that the 1977 statute satisfied federal constitutional requirements.

It was only in the instant case that a majority of that court, Justices Richardson, Clark, Manuel, and Newman, upheld the statute's constitutionality. People v. Jackson, 28 Cal.3d 264, 618 P.2d 149 (1980).

As respondent later acknowledges (BIO:28), the plurality opinion of Justice Richardson in Jackson looks to this Court for guidance in construing the death penalty statute to preserve its constitutionality: ". . . we stand fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated by the high court." 28 Cal.3d at 317. Justice Newman, who joined the Frierson plurality, concluded that the California legislature had made "a reasonable and conscientious response to the United States Supreme Court rulings," and that the state court could in the future write in any constitutional procedures prescribed by this Court. 28 Cal. 3d at 318-319, Newman, J. concurring.

Most recently in People v. Harris, 28 Cal.3d 935, ___ P.2d ___ (1981) a death judgment was upheld by a four member majority. Justice Tobriner, who had dissented in Jackson, reluctantly voted for affirmance in Harris, stating, "I continue to believe that the death penalty statute under which defendant was convicted is unconstitutional. Until the majority opinion in Jackson is reversed by the United States Supreme Court or is overruled by a majority of this court, however, I consider myself bound by that decision's holding." 28 Cal.3d at 964.[1/] Thus of the five justices remaining on the court, only two have voted to uphold the constitutionality of the statute, and both look to this Court for further direction. Three justices, Chief Justice

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1. Justice Manuel, who voted to uphold the statute in Frierson and Jackson, died before Harris was decided. Justice Clark, who authored the Harris opinion, has since departed to be Deputy Secretary of State.

Bird, Justice Mosk, and Justice Tobriner, believe the statute under which petitioner has been sentenced to die is federally unconstitutional.

Thus, although respondent asserts that "it can be said with certainty that the death penalty statutes under which petitioner was sentenced stem from the United States Supreme Court decisions and are in full compliance with their mandates," (BIO: 23), the California Supreme Court has expressed far greater reservations on the subject.

Petitioner turns now to respondent's analysis of California's former death penalty law.

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ANALYSIS

By focusing on isolated and individual procedural inadequacies in former California Penal Code sections 190.2 and 190.3, respondent has ignored the collective significance of those inadequacies. The basic point of the petition is therefore never met: viz., that taken together the statute fails to provide a mechanism for rationally distinguishing "the few cases in which [the death penalty] is imposed from the many in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

Whatever differences may exist as to the meaning of this Court's decisions in Gregg,[2/] Proffitt,[3/] and Jurek,[4/] this much is clear: they proceed from an underlying concern that death sentences be imposed (1) rationally and (2) consistently.

The seeds of the plurality opinions in Gregg, Proffitt, and Jurek are found in Justice Stewart's separate concurring opinion in Furman v. Georgia, supra, 408 U.S. at 306-10. His concern there and in Gregg is simply that the death penalty not be imposed in any one case for an arbitrary, capricious, or penologically improper reason and that the penalty be imposed from case to case on a similarly non-arbitrary, rational, and consistent basis. These two sides of the same coin -- informed rationality and consistency -- are reflected in Mr. Justice Stewart's desire on the one hand to protect against a "freakish" (408 U.S. at 310) imposition of the death penalty and on the other in his and Mr. Justice White's desire -- later cited by Justice Stewart (see Gregg, supra, 428 U.S. at 198; Proffitt, supra, 428 U.S. at 253) -- to ensure that there is a "meaningful

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2. Gregg v. Georgia, 428 U.S. 153 (1976).

3. Proffitt v. Florida, 428 U.S. 242 (1976).

4. Jurek v. Texas, 428 U.S. 262 (1976).

basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." 408 U.S. at 313.[5/] In one way or another, the opinions in Gregg, Jurek, and Proffitt are explicable as attempts to formulate procedures designed to ensure that these two goals are met. Thus, in summarizing what it was about the Georgia statute that preserved it from constitutional attack, the Stewart plurality in Gregg adverted again to Furman and concluded as follows:

> "The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here." 428 U.S. at 206-07.

This same concern for confining the death decision within a given case to rational factors and for ensuring that arbitrary decisions are correctable so that the death penalty can be applied consistently from cases to case is echoed in

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5. Justice Stewart's similar concern in Furman that the death penalty be applied in an even-handed way is reflected in his remark that pre-Furman "death sentences [were] cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-10 (fns. omitted).

Proffitt[6] and Jurek.[7]

In upholding the statutes in Georgia, Texas, and Florida, this Court approved of and thereby focused on four principal procedural devices which advanced the dual aims of rational and consistent imposition of death sentences:

1. Objective, clear standards to guide the sentencing authority and to focus its discretion (Gregg at 194-95; Proffitt at 251; Jurek at 273-74).

2. A requirement that the sentencing authority indicate

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6. "Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentence of death will not be 'wantonly' or 'freakishly' imposed. See Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring). Accordingly, the judgment before us is affirmed." 428 U.S. at 259-60.

7. "We concluded that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution. Furman v. Georgia, 408 U.S., at 310 (Stewart, J., concurring)." 428 U.S. at 276.

in writing the basis on which it decided to impose the death penalty (Gregg at 195; Proffitt at 250; Jurek at 269).

3. Instructions to the sentencing authority in the nature of a specific burden of proof or other device advising it how to resolve or weigh any conflict between statutory aggravating and mitigating circumstances. (Gregg at 166, n. 9; Proffitt at 250; Jurek at 269.)

4. A mechanism to review "aberrant" death sentences so as to ensure that the death penalty is proportionately applied. (Gregg at 205; Proffitt at 251; Jurek at 276.)

Each of these devices in one way or the other helps protect against arbitrary decisions in given cases and serves to winnow out the aberrant decision, thereby assuring uniformity and consistency in application of the death penalty. By focusing on one or the other of the devices without reference to the others, respondent in this case overlooks their collective significance:

1. Objective criteria guide and focus the jury's decision so that it will rest on penologically appropriate principles. Pre-Furman capital statutes were defective because the absence of such guidelines left to the individual whim of each jury in its own untrammelled, unreviewable discretion the task of deciding who shall live and who shall die. Under such circumstances decisions could be made for wholly arbitrary reasons without anyone knowing it. Consistency of results could not be expected since a jury was not at any point told the basis on which it was to make its decision.

2. A requirement that the sentencing authority indicate in writing the basis on which it decides to impose the death penalty advances the aim that the decision will be predicated on a rational ground, and beyond that, that if the decision is irrational it can be uncovered and corrected.

3. A specified burden of proof ensures that the jury will be guided in its decision and also helps to assure that consistent results will be reached in similar cases. Without an articulated burden of proof twelve individual jurors could decide on the basis of twelve different standards whether the death penalty is appropriate. The existence of a burden of proof is a means by which to ensure that two juries faced with an identical set of facts may reach the same result. Without a burden there is a danger that one jury, deeming its responsibility to give the defendant the benefit of the doubt before ordering his execution, will impose a sentence of life while another jury on identical facts, not considering itself so limited, will impose the death penalty.

4. Proportionality review of disparate sentences is the ultimate corrective and guarantee that the penalty will not be irrationally imposed within a case and, conversely, that it will be imposed consistently between cases.

Although it may not be necessary that all of these safeguards must exist to satisfy constitutional requirements, a statute such as California's which provides none of them cannot survive.

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CONCLUSION

More than twenty men now sit on Death Row in California, sentenced to death under a statute of doubtful constitutionality. Death penalty proponents in California had sufficient reservations about its constitutionality that even before it had been reviewed by the California Supreme Court they passed a ballot initiative which not only expanded the statute's coverage but also sought to remedy its perceived deficiencies.[8/] Three justices of the California Supreme Court believe it to be federally unconstitutional. Even those justices who voted to uphold the statutes look to this Court for guidance on its implementation.

Petitioner, and others similarly situated, should not be executed without this Court affording the 1977 California death penalty law full review under the federal constitution.

DATED: March 20, 1981

Respectfully submitted,

JOSEPH SHEMARIA
Attorney for Petitioner

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8. Calif. Voters Pamp., Gen. Elec. (Nov. 7, 1978), rebuttal to argument against Prop. 7, p. 35.